

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The     )  
Dayton Power and Light Company for     ) Case No. 08-1094-EL-SSO  
Approval of its Electric Security Plan.     )

In the Matter of the Application of The     )  
Dayton Power and Light Company for     ) Case No. 08-1095-EL-ATA  
Approval of Revised Tariffs.             )

In the Matter of the Application of The     )  
Dayton Power and Light Company for     )  
Approval of Certain Accounting             ) Case No. 08-1096-EL-AAM  
Authority Pursuant to Ohio Rev. Code     )  
Section 4905.13.                             )

In the Matter of the Application of The     )  
Dayton Power and Light Company for     ) Case No. 08-1097-EL-UNC  
Approval of its Amended Corporate       )  
Separation Plan.                             )

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**APPLICATION FOR REHEARING  
BY  
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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November 4, 2022

“(willing to accept service by e-mail)

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DP&L (now AES) has been charging Dayton-area consumers \$76 million a year for so-called “stability,” under DP&L’s reinstated 2009 electric security plan. Last year, in response to OCC’s rehearing request, the PUCO, with public fanfare,<sup>1</sup> ordered DP&L “to file new proposed tariffs providing that the RSC [rate stability charge] shall be refundable ‘to the extent permitted by law.’”<sup>2</sup> The refund language, ordered by the PUCO

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<sup>1</sup> Refundability had become a very public consumer issue. The topical nature of utility refunds was reflected during the Ohio Senate’s confirmation hearing for PUCO Chair French.

<sup>2</sup> *In the Matter of the Application of the Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 08-1094-EL-SSO, Fifth Entry on Rehearing at ¶64 (June 16, 2021).

at OCC's request, was intended to allow consumer refunds if the Supreme Court finds the stability charge unlawful or unreasonable.

However, as the PUCO acknowledged (after OCC brought it to their attention) DP&L "did not file final tariffs as directed by the Commission."<sup>3</sup> Instead, DP&L continued to charge consumers under prior tariffs that lacked the refund language the PUCO had ordered.

So for approximately 11 months, DP&L failed to charge stability rates in accordance with its PUCO's approved rate schedule, i.e. rates with the PUCO-ordered refund provision – "refundable to the extent permitted by law." During that 11-month period DP&L collected about \$60 million from Dayton-area consumers.

Under the law, the PUCO *must* recognize in this rehearing that DP&L was collecting its stability charge since August 11, 2021 in violation of the PUCO's Order and Ohio laws (R.C. 4905.22, 4905.32 and 4905.54). The PUCO should order DP&L to return its illegally collected stability charge to its consumers. But it has so far refused to do so.<sup>4</sup>

Accordingly, under R.C. 4903.10, OCC applies for rehearing of the PUCO's October 5, 2022 Entry. The Entry unlawfully and unreasonably denied consumers a refund of charges that were collected from them under unauthorized tariffs. The PUCO's Entry is *unreasonable and unlawful* in the following respects:

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<sup>3</sup> *Id.*, Eighth Entry on Rehearing at ¶¶24; 25 "AES Ohio did mistakenly fail to timely file final tariffs in response to the approval of the proposed tariffs in the Sixth Entry on Rehearing dated August 11, 2021." (Aug. 10, 2022).

<sup>4</sup> Ninth Entry on Rehearing at ¶32 (Oct. 5, 2022).

**Claim of Error 1: The PUCO erred when it failed to order refunds for \$60 million paid by consumers under DP&L's unauthorized tariffs, after finding that the issue is "moot." Contrary to the PUCO's conclusion, the issue is capable of repetition while evading review and is therefore an exception to mootness.**

**Claim of Error 2: The PUCO erred, violating R.C. 4903.09, when it unlawfully and unreasonably claimed, without evidence and sound reasoning, that it approved DP&L's tariffs under authority independent of the rehearing statute.**

**Claim of Error 3: The PUCO erred in stating that the plain language of R.C. 4903.10 and the case law does not limit its authority to address issues on rehearing.**

The PUCO should grant rehearing and abrogate or modify its October 5, 2022 Ninth Entry on Rehearing. The PUCO should order DP&L to return to consumers the stability charges it collected without an authorized tariff since August 2021.

The reasons for granting this Application for Rehearing are set forth in the attached Memorandum in Support.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

In the name of justice for DP&L consumers, OCC has sought refunds to consumers in this case.<sup>5</sup> In its October 5, 2022 ruling, the PUCO once again denied DP&L consumers a refund of charges they paid for DP&L’s stability charge because the issue was purportedly “moot.”<sup>6</sup> Additionally, the PUCO unlawfully asserted (without record support or sound reasoning) that it approved DP&L’s tariffs under authority

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<sup>5</sup> See, e.g., OCC’s Application for Rehearing (Sept. 9, 2022).

<sup>6</sup> Ninth Entry on Rehearing at ¶32 (Oct. 5, 2022).

independent of the rehearing statute. And the PUCO tried to justify its decision by misinterpreting both Ohio law (R.C. 4903.10) and governing case law.<sup>7</sup>

OCC requests rehearing of these PUCO findings in its October 5, 2022 Entry. The PUCO should grant rehearing and abrogate or modify its Entry. The PUCO should order refunds to DP&L consumers for the illegally collected stability charges that consumers paid from August 2021 to June 2022.

## II. ARGUMENT

**Claim of Error 1: The PUCO erred when it failed to order refunds for \$60 million paid by consumers under DP&L’s unauthorized tariffs, after finding that the issue is moot. Contrary to the PUCO’s conclusion, the issue is capable of repetition while evading review and is therefore an exception to mootness.**

In its third assignment of error, OCC demonstrated that the PUCO erred when it failed to find that DP&L’s collection of stability charges was unauthorized and in violation of law and a PUCO order.<sup>8</sup> In its Ninth Entry on Rehearing, the PUCO concluded that OCC had not demonstrated error because the issue was “moot.”<sup>9</sup>

But as recognized by the Ohio Supreme Court, even if a case or controversy is moot, there are exceptions where it is appropriate to nonetheless decide the issues. The exception to the mootness doctrine applicable here is for claims that are capable of

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<sup>7</sup> *Id.* at ¶¶36-39.

<sup>8</sup> OCC’s Application for Rehearing at 9-13 (Sept. 9, 2022).

<sup>9</sup> Ninth Entry on Rehearing at ¶32 (Oct. 5, 2022).

repetition, yet evading review.<sup>10</sup> This doctrine originated in U.S. Supreme Court cases, dating back to 1911.<sup>11</sup>

In applying the “capable of repetition, yet evading review” exception, two factors are looked to: (1) whether the challenged action is too short in its duration to be fully litigated before its cessation or expiration; and (2) whether there is a reasonable expectation that the same complaining party will be subject to the same action again.<sup>12</sup>

Here the challenged action could evade review. The PUCO allowed DP&L to charge consumers for the stability charge that is in effect only until the next ESP rate plan (ESP 4) is approved. It is expected that DP& ESP 4 will be approved in 2023 and new rates (without the stability charge) will be charged to consumers. DP&L has already applied for approval of its next electric security plan under an expedited schedule, seeking to have ESP 4 rates effective July 1, 2023.<sup>13</sup> That short time frame prevents the refund issue from being fully litigated.<sup>14</sup>

Additionally, the issue is capable of repetition. In *P&G Bankers Trust Co.*,<sup>15</sup> the court explained that the “capable of repetition” requirement is satisfied when there is a

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<sup>10</sup> *State ex rel. Beacon Journal Co. v. Donaldson*, 63 Ohio St.3d 173, 175, 586 N.E.2d 101 (1992) (finding that an order closing the courtroom during one phase of a criminal proceeding could be ruled upon after the closure expired and after the trial court amended its closure rules).

<sup>11</sup> See *Southern Pacific Terminal Co. v. Interstate Commerce Com.*, 219 U.S. 498, 515-16, 31 S.Ct. 279, 55 L.Ed. 310 (1911) (an order of Interstate Commerce Commission (“ICC”) that was being appealed expired, but the Court did not dismiss as moot, finding the ICC order may be the basis of further proceedings).

<sup>12</sup> *State ex rel. Beacon Journal Co.* at 75 (citing *Weinstein v. Bradford*, (1975), 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350).

<sup>13</sup> Case No. 22-0900-EL-SSO, Motion of the Dayton Power and Light Company to Expedite Hearing Schedule (Sept. 26, 2022).

<sup>14</sup> See *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 94 S.Ct. 1694, 40 L.Ed.2d 1 (1974) (a case or controversy continued to exist when petitioners appealed benefits to strikers, despite the fact that the strike had ended).

<sup>15</sup> 78 F.3d 219, 223-24 (6th Cir. 1996).



reasonable expectation that the same complaint will be in issue in the future. There the Sixth Circuit Court of Appeals ruled that an appeal challenging a temporary restraining order enjoining publication of documents was not rendered moot when documents were unsealed and released into the public domain.<sup>16</sup> “Review must be kept alive when a judge issues a prior restraint that he can cease when challenged and then take up again at a later time, only to cease again just in time to prevent appellate review. The doctrine of mootness is not to be used as a spoof on appellate courts.”<sup>17</sup>

Here, a utility’s right to charge consumers without a proper tariff is capable of repetition. Utility tariffs can (and do) run into the hundreds of pages. The PUCO’s docket is full of cases that will require new tariffs, tariff updates, both, and more. It can be reasonably expected that this issue will repeat itself. And it is expected that parties (and the PUCO) will rely upon the entries in this case, which may become the basis of future orders.<sup>18</sup> Because OCC’s application for rehearing raises important issues that are capable of repetition, yet evading review, the PUCO should rule upon them, even if the issues would otherwise be considered moot.

The PUCO erred. Rehearing should be granted. The PUCO should order DP&L to return to consumers all illegally collected stability charges since August 2021.

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *See Southern Pacific Terminal Co.*, 219 U.S. 498, 515-16, 31 S.Ct. 279, 55 L.Ed. 310 (1911) (refusing to dismiss expired commission order, finding that commission orders are usually continuing and may be the basis for further proceedings); *Boise City Irr. & Land Co. v. Clark*, 131 F. 415, 419 (9th Cir. 1904) (despite the fact that the municipal ordinance fixed rate had expired, court decided its legality, finding it had entertained such cases before and it is necessary and proper to decide some questions of law to guide the municipality when acting in the future).

**Claim of Error 2: The PUCO erred, violating R.C. 4903.09, when it unlawfully and unreasonably claimed, without evidence and sound reasoning, that it approved DP&L’s tariffs under authority independent of the rehearing statute.**

In denying OCC’s latest application for rehearing, the PUCO came up with new-found authority for its ruling – (to OCC’s knowledge) authority never relied upon or mentioned before in the context of a PUCO Rehearing Entry. The PUCO said it approved DP&L’s tariffs through the Entry on Rehearing under authority that was independent of R.C. 4903.10. The PUCO, in a footnote explained itself:

In determining that OCC’s assignment of error was moot, the Commission did not concede that OCC’s characterization of the Seventh Entry on Rehearing was correct. Although the order was plainly styled “Seventh Entry on Rehearing,” the order consisted of three distinct parts: (1) acceptance of the withdrawal of applications for rehearing; (2) the now-vacated approval of the proposed tariffs; and (3) granting a stay requested by OCC. Only the first part of the order was done pursuant to the Commission’s authority under R.C. 4903.10. Under the second part, the Commission proceeded with its authority to approve proposed tariffs, independent of the rehearing statute. Further, in the Sixth Entry on Rehearing, the Commission did the exact same thing. The Commission denied the applications for rehearing filed by OCC and AES Ohio, and the Commission approved AES Ohio’s proposed tariffs which included the refund language. Sixth Entry on Rehearing at ¶ 48, 51-53.<sup>19</sup>

Despite best efforts, there appears to be no authority (the PUCO does not cite any) for the proposition that an entry “plainly styled” as an entry on rehearing has been, or can be, made independent of the rehearing statute – R.C. 4903.10. The PUCO’s new-found conclusion to the contrary was without record support and sound reasoning, violating

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<sup>19</sup> *Id.* at ¶36, n. 1.

R.C. 4903.09.<sup>20</sup> The PUCO must have reasoned explanations and bases for its decisions.<sup>21</sup> There are none here.

The PUCO as a creature of statute has no authority other than that delegated to it by the General Assembly.<sup>22</sup> The General Assembly has not delegated to the PUCO authority to decide matters on rehearing independent of the rehearing statute – R.C. 4903.10. Rehearing should be granted.

**Claim of Error 3: The PUCO erred in finding that the plain language of R.C. 4903.10 and the case law does not limit its authority to address issues on rehearing.**

In its application for rehearing, OCC demonstrated that the PUCO misused the statutory process to issue a ruling on a matter upon which a party did not seek rehearing, violating R.C. 4903.10.<sup>23</sup> OCC argument focused on the actual language in R.C. 4903.10 that limits the PUCO’s authority on rehearing to addressing “the matter specified in such application[]” and governing case law.<sup>24</sup>

The PUCO, through dicta, opined that “even if OCC’s fifth assignment of error was not both moot and improper, the Commission would deny rehearing on this assignment of error.”<sup>25</sup> The PUCO said that the plain language of the statute does not limit the PUCO’s authority to modify the original order to “matters raised on rehearing.”

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<sup>20</sup> R.C. 4903.09; *see, e.g., In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401, ¶19 (PUCO’s approval of distribution modernization rider as an incentive is both unlawful and unreasonable because it lacks evidence and sound reasoning); *In re Suvon, LLC.*, 166 Ohio St.3d 519 (2021) (PUCO must provide a reasoned explanation for the basis of its decisions).

<sup>21</sup> *Id.*

<sup>22</sup> *See, e.g., Time Warner AxS v. Publ. Util. Comm.*, (1996), 75 Ohio St.3d 229, 661 N.E.2d 1097.

<sup>23</sup> OCC Application for Rehearing at 18-22 (Sept. 9, 2022).

<sup>24</sup> *See id.*

<sup>25</sup> *Id.* at ¶37.

The PUCO's ability to abrogate its original order or any part thereof under R.C. 4903.10 is conditioned on holding rehearing "on matters specified in such application [for rehearing]."<sup>26</sup> The PUCO cannot lawfully broaden the scope of rehearing to matters that were not raised in applications for rehearing before it.<sup>27</sup> The plain language of the statute prohibits it. And Supreme Court precedent precludes it.

Under R.C. 4903.10, the PUCO "may grant and hold such *rehearing on the matter specified in such application* if in its judgement sufficient reason therefor is made to appear." If rehearing is held, "after such rehearing," the PUCO may abrogate or modify "the original order or any part thereof" that "is in any respect unjust or unwarranted or should be changed." The statute is unambiguous, and therefore must be applied as written, and not interpreted.<sup>28</sup> Further, the PUCO as a creature of statute has no authority other than that delegated to it by the General Assembly.<sup>29</sup> The General Assembly has not delegated to the PUCO authority to broaden the scope of R.C. 4903.10 to include rehearing matters that were not raised in applications for rehearing.

The PUCO voiced its disagreement with "OCC's cramped interpretation of R.C. 4903.10," claiming that it is not supported by the plain language of the statute or by the caselaw cited by OCC.<sup>30</sup> Cramped as it may be, OCC's position follows the words of the law. The PUCO, on the other hand, stretches the law like silly putty --to a point where it

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<sup>26</sup> The Ohio Supreme Court has also ruled that the PUCO may not modify an order on rehearing where it has denied and not granted rehearing. *Disc. Cellular, Inc. v. PUC*, 112 Ohio St.3d 360, 859 N.E. 2d 957, 2007 Ohio 53.

<sup>27</sup> The PUCO, as a creature of statute, has no authority other than that delegated to it by the General Assembly. *See, e.g., Time Warner AxS v. Publ. Util. Comm.*, (1996), 75 Ohio St.3d 229.

<sup>28</sup> *See, e.g., Sears v. Weimer*, (1944), 143 Ohio St. 312, 316-317, 55 N.E.2d 413.

<sup>29</sup> *Time Warner AxS v. Publ. Util. Comm.*, (1996), 75 Ohio St.3d 229.

<sup>30</sup> Ninth Entry on Rehearing at ¶37.

is not recognizable. Under the PUCO interpretation there are no limits as to what it can address on rehearing. Its position fundamentally conflicts with the words of the law and its intent—to have the PUCO review (and subsequent appellate review) matters solely raised on rehearing – those under R.C. 4903.10 that are “specified in such application[s].”

The PUCO misconstrues the Ohio Supreme Court’s holding in *Doc Goodrich & Son, Inc. v. Pub. Util. Comm.*, relying on dicta instead of the case syllabus.<sup>31</sup> Quoting from dicta contained in the Court’s decision (rather than the syllabus), the PUCO asserts that “OCC misrepresents the Supreme Court’s actual decision in *Doc Goodrich*. The Court expressly declined to rule on whether the Commission is limited on rehearing to the issues raised in the applications for rehearing\*\*\*.”<sup>32</sup>

But “[t]he syllabus of an Ohio Supreme Court decision states the law of the case and is binding upon all lower Ohio courts. Moreover, the resolution of conflict between *obiter dictum* and syllabus law is a function reserved exclusively for the Supreme Court. Until the Supreme Court undertakes that resolution, the syllabus is presumed to be the law of the case and all lower courts are bound to adhere to the principles set forth therein.”<sup>33</sup> OCC cited syllabus law. The PUCO cites dicta. Syllabus law controls.

Though the PUCO claims that OCC “misrepresents” the PUCO’s decision in *In re: Complaint of Ohio Cable Telecommunications Assoc. et al.*,<sup>34</sup> the PUCO ignores the fact that it relied on *Doc Goodrich* as authority for its ruling. In the *Ohio Cable*

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<sup>31</sup> 53 Ohio St.2d 70 (1978).

<sup>32</sup> Ninth Entry on Rehearing at ¶39.

<sup>33</sup> *Portage Trail Dental Bldg. v. Venarge*, 1994 Ohio App. Lexis 2417, \*8 (Summit 1994) (internal quotations and citations omitted).

<sup>34</sup> Case No. 96-1309-EL-CSS, Entry on Rehearing (Dec. 4, 1997).

*Telecommunications* case, the PUCO was squarely faced with the issue of whether it could decide on rehearing matters raised outside an application for rehearing.<sup>35</sup> Relying on *Doc Goodrich*, the PUCO said “[w]e believe our directive was within the scope of issues raised in the initial applications for rehearing and, therefore, can properly be considered by the Commission.”<sup>36</sup> The logical implication (particularly given the reliance on *Doc Goodrich*) is that the PUCO could not have considered the issue had it not been part of the application for rehearing. Yet the PUCO conveniently dismisses such logic.

Here the PUCO broadened the scope of rehearing, *sua sponte*, contrary to the plain language of R.C. 4903.10 and Ohio Supreme Court precedent. It improperly used the rehearing process to “cure an alleged deficiency” that in reality was no deficiency at all. That matter was not before the PUCO for its consideration. The PUCO had no authority under law to address the matter on rehearing.

The PUCO erred. Rehearing should be granted. The PUCO should order DP&L to return to consumers all illegally collected stability charges since August 2021.

### **III. CONCLUSION**

OCC seeks justice for the 465,000 residential consumers of DP&L. In this case justice means \$60 million refunded to consumers of stability charges unlawfully collected from them under unauthorized tariffs, in violation of Ohio law. It’s just as simple as that.

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<sup>35</sup> See *id.* at 2 (characterizing argument: “Complainants contend that the Commission lacked statutory authority to grant rehearing *sua sponte* on this issue since it was not raised in an application for rehearing.”).

<sup>36</sup> *Id.* at 3.

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Application for Rehearing was electronically served via electric transmission on the persons stated below this 4th day of November 2022.

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UNC**

Summary: App for Rehearing Application for Rehearing by Office of the Ohio  
Consumers' Counsel electronically filed by Mrs. Tracy J. Greene on behalf of Willis,  
Maureen R.